IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.507 OF 2006.

Samuben Chunilal Chandan. ... Appellant.
Versus.
The Municipal Corporation of
Greater Mumbai and others. ... Respondents.

Shri Saraf i/by Shri Kishore Thakordas and Co. for the Appellant.

Shri J.J.Xavier for the Respondents.

CORAM : ABHAY S.OKA, J.

DATED : 21st April, 2006.

P.C.:

1. Heard the learned Counsel appearing for the parties. True copies of the pleadings, notes of evidence and all the documents which are filed on the record of the trial Court are placed on on the record of this Appeal. The Appellant is the original Plaintiff. The challenge in the suit filed by the Appellant-Plaintiff is to the notice issued under section 351 of the Bombay Municipal Corporation Act, 1888 and the orders passed by the Deputy Municipal Commissioner of the demolition of the offending structure on the basis of the said notice.

2. The Appellant-Plaintiff claims to have acquired the property subject matter of the dispute which was comprising of ground and one upper floor. The

acquisition of the property by the Appellant is in the year 1984. Earlier a notice was issued to the Appellant under section 354A of the said Act which was replied to by the Appellant. The controversy in the present suit relates to a notice under section 351 of the said Act issued on 22nd October 1988. In the said notice the allegation made by the Respondent- Corporation is that there is unauthorised reconstruction of the roof of the first floor admeausirng 59’x7’x9’ and there is unauthorised covering of open chowks admeasuring 4".7" x 4" and 8’.00" x 5’ and 4.8’ x 4’ at ground floor. On 26th October 1988 a reply was sent by the Advocate for the Appellant to the Respondnet-Corporation. The reply was of denial. It was stated that the property is in the same condition as it was when the Appellant purchased the same in the year 1984. He contended that the action of issuing the notice was taken at the instance of a third party.

3. The Ward Officer by his letter dated 7th November 1988 called upon the Advocate for the Appellants to submit documentary evidence of authorisation of the structure. The Advocate for the Appellant responded to the said requisition by a letter dated 15th November 1988. By the said letter a personal hearing was sought by the Appellant. The Appellant also called upon the Respondents to give inspection of the

building plans of the building.

4. On 8th June 1995, after giving an opportunity of being heard to the appellant, a speaking order was passed by the Deputy Municipal Commissioner holding that the offending construction described in notice under section 351 was illegal. By further letter dated 19th December 1997 sent by the Advocate for the Appellant certain documents were forwarded to the Deputy Municipal Commissioner. In the meanwhile the present suit was filed by the Appellant in the City Civil Court in which interim order was passed directing the Deputy Municipal Corporation to give a fresh hearing on the show cause notice under section 351 of the said Act and to pass an order. On 21st February 1998 an order was passed by the Deputy Municipal Commissioner after hearing the Advocate of the Appellant.

5. The Appellant examined her Constituted Attorney one Dilip Chunilal Chandan and placed on record the assessment bills in respect of the suit property and the correspondence between the Appellant and the Respondent. The Respondent-Corporation cross examined the said witness. No oral evidence was led by the Respondents. The learned trial Judge by the impugned Judgment and Decree has dismissed the suit by holding that the impugned orders passed by the Deputy Municipal

Commissioner were legal and valid.

6. Shri Saraf, the learned Counsel appearing appearing for the Appellant pointed out that the Appellant had purchased the property in the year 1984. He submitted that the assessment extracts show that the property was in existence from 1946. He submitted that though the Respondent-Corporation was in possession all the records such as sanctioned plan, city survey maps etc. the Corporation has failed to produce documents in their custody and therefore, adverse inference ought to have been drawn against the Corporation. He submitted that the trial Court has committed an error by dismissing the suit. He has also drawn my attention to the assessment bills and other documents produced on record by the Appellant.

7. Shri Xavier appearing for the Respondents supported the impugned Judgment and Decree and submitted that the Appellant could not prove that the structure was authorised.

8. I have considered the submissions. The stand taken by the Appellant in response to the notice sent under section 351 of the said Act was that the Appellant acquired the property in 1984 and no further changes have been made by the Appellant in the property and the

property was in the same condition as it was in the year 1984 when the property was acquired by the Appellant. When the action is taken under section 351, the burden was on the Appellant to establish that either the alleged unauthorised construction was made after due permission of the Respondent-Corporation or that the he structure is required to be tolerated in accordance with any of the existing policies of the Respondent-Corporation and/or the State Government. The stand taken by the Appellant was that no changes have been made by the Appellant after the year 1984 i.e. after acquisition of the said property. It is pertinent to note that not only that the Appellant herself failed to enter the witness box, but no other witness was examined to show that right from 1984 the offending construction was very much in existence. The Appellant could have examined her predecessor-in-title or any other person to show that the offending structure was very much there from the year 1946 i.e. from the date on which the building is said to have been in existence. However, no witness was examined by the Appellant. Reliance placed on record of the assessment will not help the Appellant. The offending structure was of covering the open chowk which will have the result of violating the Rules relating to F.S.I. Merely because there is no change made in the assessment after 1985 is no ground to come to the conclusion that the offending structure was very

much there in the year 1984 and the same was not made by the Appellant. It is pertinent to note that in his cross-examination the Constituted Attorney of the Appellant admitted that he had applied to the Corporation for carrying out repairs and the permission was refused. Even in the affidavit of examination-in-chief the only stand which is taken is that nothing has been done by the Appellant after acquisition of the property.

9. In the second order passed by the Deputy Municipal Commissioner, he has stated that the Assistant Engineer (Survey) was called with the relevant survey sheets. It is noted in the order that the City Survey Sheet issued in 1969 shows the existing building having ground plus one upper floor with open chowk at the middle portion of the building. The said document is referred to in the order of the Deputy Municipal Commissioner. The second order of the Deputy Municipal Commissioner has been passed after hearing the Appellant and after consideration of the documents produced by the Appellant. If the Appellant was desirous of relying upon the certified copies of city survey records in the suit no one prevented the Appellant from taking steps for procuring the records either by applying for certified copies or by applying for witness summons. The order passed by the Deputy Municipal Commissioner is

after consideration of all the material produced before him by the Appellant. When the Appellant went to the Civil Court, it was for the Appellant to establish that the structure was in existence much prior to the datum line i.e. the cut off date fixed for regularisation. However, the Appellant has failed to produce the material to support her claim. The permission for construction is also not produced. There is no evidence to show that the offending structure is protrected by any policy of regularisation.

10. The offending construction is not established to be a legal or authorised structure. There is no merit in the First Appeal and the same is dismissed with no order as to costs.

11. At this stage Shri Saraf appearing for the Appellant prays that the ad-interim relief be extended till 15th August 2006. The said request is strongly opposed by the Counsel for the Respondent. Considering the facts and circumstances of the case, ad-interim order passed by this Court on 1st March 2006 will continue to operate till 15th August 2006.

Judge.